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Susanne Guyer
Executive Director,
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EX PARTE OR LATE FILED



November 23, 1998

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Docket CCB/CPD 97-30 and 96-98 Reciprocal Compensation

Dear Ms. Salas:

Please enter the attached letter to Ms. Suzanne Tetreault of the Office of the General Counsel into the record for the above-referenced proceeding.

In accordance with Section 1.1206(a)(1) of the Commission's rules, an original and one copy of this notice are being submitted to the Secretary.

Sincerely,

A handwritten signature in cursive script that reads 'Susanne Guyer'.
Susanne Guyer

Attachment

cc: Chairman W. Kennard
H. Furchtgott-Roth
M. Powell
S. Ness
G. Tristani
K. Brown
L. Strickling

J. Casserly
T. Preiss
K. Dixon
J. Schlichting
P. Gallant
K. Martin
J. Jackson

T. Power
S. Tetreault
J. Lanning

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Michael E. Glover
Associate General Counsel



November 23, 1998

EX PARTE

Ms. Suzanne Tetreault
Office of General Counsel
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: Reciprocal Compensation On Internet Traffic (Dkts CCB 97-30 and 96-98)

Dear Ms. Tetreault:

This follows up on the issue we discussed last week.

Some have argued that, in arbitration proceedings to resolve open issues, State regulatory commissions have authority to require the payment of reciprocal compensation on Internet traffic. They are mistaken.

1. Scope of arbitration authority. The scope of a State commission's authority to arbitrate open issues is limited to the specific matters addressed by sections 251(b) and (c), and its resolution of those issues must be consistent both with section 251 and with FCC regulations under that section.

The scope of the State commission's arbitration authority is defined by section 252. The procedure laid out in that section is triggered by "a request for interconnection, services, or network elements *pursuant to section 251.*" See § 252(a)(1). In response to that request, the parties first must negotiate in good faith on "the particular terms and conditions of agreements *to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection [(c)]*" of section 251, see § 251(c)(1), and can voluntarily enter into agreements "without regard to the standards set forth *in subsection (b) and (c) of section 251,*" see § 252(a)(1).

In the event that the parties do not agree on terms of an agreement to fulfill the specific duties set out in sections 251(b) or (c), however, either party may petition a State commission to arbitrate the "open issues." See § 252(b). The State commission is then limited to addressing only the open "issues *set forth in the petition* and in the response." See § 252(b)(4). And, unlike a voluntary agreement between the parties, the State commission's resolution of those open issues must "*meet the requirements of section 251,*

including the regulations prescribed by the Commission pursuant to section 251.” See § 252(c)(1).

Under the express terms of the Act, therefore, the State commissions do not have authority to arbitrate issues or to impose terms that go beyond fulfilling the specific duties described in section 251(b) and (c).

2. Scope of reciprocal compensation duty. A State commission does not have authority in an arbitration proceeding to require the payment of reciprocal compensation on Internet traffic.

The scope of an incumbent’s duty to pay reciprocal compensation is defined by section 251(b)(5). The FCC has correctly held that the duty to pay reciprocal compensation under that provision does not “not apply to the transport or termination of interstate . . . interexchange traffic.” See 11 FCC Rcd 15499, ¶ 1034 (1996). And the FCC repeatedly has concluded that Internet traffic is interstate and interexchange in nature – most recently in the GTE tariff decision.

Consequently, because the State commission’s authority in an arbitration proceeding is limited to resolving open issues to fulfill the duties in section 251(b) and (c) -- and the duty imposed by section 251(b)(5) does not extend to interstate interexchange traffic -- the State commission has no authority to impose a reciprocal compensation obligation on Internet traffic.

3. Effect of 8th Circuit decision. Some parties claim that the 8th Circuit’s decision on jurisdiction vacates the FCC’s conclusion that section 251(b)(5) does not apply to interstate interexchange traffic. Since the meaning of the statute itself has not changed, the argument is largely beside the point. It also is wrong.

The FCC’s decision on this score was never even challenged. On the contrary, the appeals from the Local Interconnection Order only challenged the FCC’s jurisdiction over local, intrastate matters. They did not challenge the FCC’s continuing authority over interstate interexchange traffic.

Likewise, the Iowa Utilities Board decision vacated on jurisdictional grounds only carefully specified FCC rules, all of which applied only to “local” traffic. See §§ 51.701 to 51.717. The FCC’s conclusion that reciprocal compensation does not apply to interstate interexchange traffic is not contained in any of the rules that were vacated. Rather, that conclusion is set out in paragraph 1034 of the FCC’s order. That conclusion was never vacated and remains in effect.

Moreover, the 8th Circuit repeatedly has confirmed the FCC’s continuing authority to determine the rules for interstate interexchange traffic: It did so in the Iowa Utilities Board decision by upholding the FCC’s reciprocal compensation rules for CMRS traffic (which is regulated as interstate under the Act). It did so in the parallel

Comptel appeal by affirming the FCC's decision that the interconnection provision does not apply to interstate interexchange traffic, and by upholding the FCC's rules on the application of interstate access charges to unbundled network elements. 117 F.3d 1068 (8th Cir. 1997). And it did so in the dialing parity appeal by affirming the FCC's jurisdiction over interstate intraLATA traffic. 124 F.3d 934 (8th Cir. 1997).

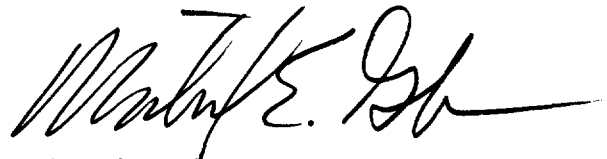
Consequently, an arbitration decision by a State commission that imposed reciprocal compensation on Internet traffic would be contrary both to the statute itself, and to a final and binding decision by the FCC construing the statute.

4. State commissions cannot write Federal law. Moreover, even if the authority of the State commissions incorrectly were construed to extend beyond the specific issues addressed in section 251(b) and (c), the States necessarily would be limited to applying – rather than writing – Federal law.

This is all the more true where, as here, there are existing FCC rules directly on point. The usual rule for interstate interexchange traffic is that interstate access charges apply. In the case of Internet traffic, however, the FCC's so-called enhanced service provider exemption governs, which provides that there should be no interstate charges assessed on Internet traffic. At most, therefore, the State commissions are limited to applying the existing “no compensation” rule; they cannot write a new compensation rule that applies to this interstate traffic.

I would be pleased to address any questions concerning the above.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael E. Glover", with a long horizontal flourish extending to the right.

Michael E. Glover